IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2007

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

C.M.A. No.2990 of 2004

Arockiaprakash ... Appellant

Vs

Rangasamy ... Respondent

Civil Miscellaneous Appeal filed under Section Order 43 Rule 1(u) C.P.C. against the decree and judgment dated 28.06.2004 in A.S.No.145 of 2003 on the file of the Principal District Court, Cuddalore against the decree and judgment dated 05.08.2003 in O.S.No.190 of 2002 on the file of the Principal Subordinate Court (Addl. Sub Court-Incharge), Vridhachalam.

For Appellant : M/s.Hema Sampath

For Respondent : Mr.D.Shivakumar

J U D G M E N T

This appeal arises against the judgment and decree dated 28.06.2004 in A.S.No.145 of 2003 on the file of the Principal District Court, Cuddalore.

2. The defendant in the suit is the appellant. The brief facts of the case are as follows :

(i) The case of the plaintiff is that the defendant executed a promissory note on 07.08.2000 at Vridhachalam for Rs.1,00,000/-, agreeing to repay the same with interest at the rate of 12% per annum. The defendant is working in Neyveli Lignite Corporation. Since the defendant did not repay the amount under the promissory note, the plaintiff filed a suit for recovery of the same.

(ii) The defendant filed written statement and contended that he has not borrowed any money from the plaintiff and that he did not execute any promissory note. According to him, the suit promissory note is a fabricated document. The defendant's father instituted a suit in O.S.No.90 of 2000 on the file of Principal Sub Court, Vridhachalam against one Karuppan based on the promissory note executed by him and the suit was decreed. Aggrieved by the same, the said Karuppan with the assistance of the plaintiff has fabricated the suit promissory note. The defendant has issued proper reply to the notice issued by the plaintiff.

(iii) The plaintiff examined himself as P.W.1 and three other witnesses were examined. Ex.P1-Promissory note was marked. The defendant examined himself as D.W.1. On behalf of the defendant, Ex.R1-judgment in O.S.No.90 of 2000 on the file of the Principal Sub Court, Vridhachalam, Ex.R2 - suit notice, Ex.R3 - reply notice sent by the counsel for defendant, Ex.R4-notice sent by the plaintiff and Ex.R5 - reply notice sent by the Counsel for defendant, were marked.

(iv) Learned Principal Subordinate Judge, Vridhachalam found that the suit promissory note was executed for consideration and decreed the suit. Aggrieved by the judgment and decree, the defendant filed A.S.No.145 of 2003 on the file of the Principal District Court, Cuddalore.

(v) The main contention of the defendant in the suit was that the plaintiff and the defendant are not known to each other and the plaintiff is a man of no means. The defendant has pleaded that the suit promissory note came into existence under extraordinary circumstances, because of the enmity between Karuppan and the defendant. The defendant further submitted that apart from marking of documents relating to the earlier suit in between the said Karuppan and the defendant's father, there is no other evidence to prove that the plaintiff had parted with the money.

(vi) On an analysis of pleadings and evidence, learned Appellate Judge held that the Trial Court having observed that the signature of the defendant found in Ex.P1 and the signature in the Vakalat are more or less similar, a specific finding ought to have been given by the Trial Court and since the plaintiff has not adduced any evidence to prove that he has means to advance the amount, the plaintiff should be given an opportunity to let in evidence.

For the above said reasons, the lower Appellate Court has set aside the judgment and decree made in O.S.No.90 of 2000 on the file of the Principal Sub Court, Vridhachalam and remanded the matter to the Trial Court for fresh disposal of the suit and to let in additional evidence by the parties. Aggrieved by the order of remand, the defendant has preferred this appeal.

3. Heard Mrs.Hema Sampath, learned Counsel appearing for the appellant and Mr.D.Shivakumar, learned Counsel appearing for the respondent.

4. Learned Counsel for the appellant/defendant submitted that the Appellate Court ought to have assessed the evidence and pleadings and determined the points which arose for consideration. She further submitted that if the plaintiff had failed to prove his case, the appeal ought to have been decided on its merits and that the plaintiff should not be given an opportunity to improve his case to fill up the lacuna. She further submitted that in the light of the categorical admission of the plaintiff that he did not know the defendant and his address, he would not have lent a huge sum of Rs.1,00,000/- to a stranger.

Inviting the attention of this Court to the evidence let in by P.W.1, plaintiff and the attesting witnesses, learned Counsel for the appellant/defendant submitted that there is no evidence to prove that the plaintiff had advanced any amount to the defendant and the suit promissory note is a fabricated document to take vengeance. Learned Counsel further submitted that the plaintiff has miserably failed to prove that the defendant had means to pay the amount under Ex.P1-Promissory note.

5. Placing reliance on the decisions of this Court reported in 1968 (2) MLJ 548 (Subramanian and another vs. Kaliammal and others) and 2003 (4) L.W. 873 DB (Subbiah Konar and three others vs. State of Tamilnadu through District Collector, Tirunelveli and another) learned Counsel for the appellant/defendant submitted that the Appellate Court has erred in remanding the suit for fresh disposal and that the Appellate Court itself ought to have decided the matter on its own merits.

(i) In Subramanian and another vs. Kaliammal and others reported in 1968 (2) MLJ 548, learned Counsel for the appellant submitted as follows:

"Before an appellate Court can remand a matter for fresh disposal to the lower Court under Order 41, Rule 23, first it must come to a conclusion that the decision of the Trial Court is liable to be reversed or set aside. In the absence of such a conclusion, a power of remand is not available to an appellate Court. Thus, where a remand order is passed whether in a case where a suit has been disposed of upon a preliminary point or in a case where a suit has been disposed of on merits, the condition precedent for the exercise of the power of remand is a finding by the appellate Court that the judgment and decree of the trial Court is erroneous on facts on law and therefore liable to be reversed or set aside. So long as that finding has not been arrived at, there is no scope for the appellate Court reversing or setting aside the judgment and decree of the trial Court and as a consequence thereof remanding the suit for fresh disposal."'

(ii) In Subbiah Konar and three others vs. State of Tamilnadu through District Collector, Tirunelveli and another reported in 2003 (4) L.W. 873 DB, this Court in paragraph 14 has held as follows :

"14. It is well settled that remand is not meant to give another chance to the parties to fill up the lacuna or to substantiate what the plaintiffs or defendants have failed to prove or establish. Remand is also not permissible to fill up the lacuna or to enable the parties to let in fresh evidence when the very plaintiffs who come forward with the suit have failed to establish their case."

6. Per contra, learned Counsel for the respondent/plaintiff placing reliance on a decision reported in AIR 2003 Supreme Court 3167 (REMCO Inds. Workers House Building Coop. Society vs. Lakshmeesha M. and others), submitted that the powers of the Appellate Court are not inhibited by the commissions or omissions of the parties and the Appellate Court is empowered to remand the whole suit for retrial.

7. Principles of law regarding remand have been laid down by this Court, long back in a decision reported in AIR 1954 Madras 783 (Middi Ramakrishna Rao vs. Middi Rangayya and others), wherein this Court has held as follows :

"4. ... It has been repeatedly held by this Court that a remand should not, generally speaking, be ordered when the defect in the proceeding has been made due to the negligence or default of the party who will benefit by the remand. It has been further held that the mere fact that the evidence on record is not sufficient to enable a Court to come to a definite finding on the point in issue, is not sufficient to enable the Court to remand the case, when there is no reason to think that the parties did not have an opportunity of producing all the evidence that they desired to produced before the trial Court. ..."

The above said principle is followed in a decision reported in 1989 Madras 18 (Srinivasagam vs. Kuttiah), that remand should not be made just to fill up a lacuna by allowing the party to adduce evidence, but remand is possible only if the court feels that further evidence is necessary for arrival at the just decision.

The decision relied on by the Counsel for the respondent has been rendered on the facts of the case and it is not applicable to the case on hand. In the reported case, the issue was regarding the grant of occupancy rights, one in favour of the tenant and another in favour of the plaintiff in the suit. The Lower Court while adjudicating the dispute between the parties, failed to consider the effect of the grants made to the parties and no decision was arrived at by the Court. The Court observed that the identity of the land under the two grants was vital for the just decision of the case. In that context,

the Apex Court set the aside the decision of the High Court and remitted the mater to the Trial Court to decide the effect of grants and identify the lands under the grants. In that case, the Lower Courts had failed to frame specific issues relating to the effect of the grant, which was vital for the purpose of just decision.

8. (i) In a decision reported in 1997 AIHC 59 (Poolar vs. Gomathi Moopanar and others), this Court has held that "an order of remand should not be made to fill up the lacuna of the party. The Appellate Court should make an endeavour to dispose of the case by itself and the commissions and omissions made by the Trial Court should be corrected by the Appellate Court itself".

(ii) In Parvathy vs. Ramakrishna Mission and others reported in (2001) 3 MLJ 309, this Court held that while reversing the judgment and decree of the Trial Court, the Lower Appellate Court ought to have given reasons as to how the Trial Court is wrong in its conclusions.

(iii) In 2000 (1) CTC 613 (M/s.Sekaran Real Estates, represented by Managing Partner, K.Chandrasekaran vs. Punjab National Bank, Mylapore, Chennai, this court in paragraph 4 has held as follows :

"4. It is clear from the above decisions as well as the provisions contained in Order 41, Rules 23 to 29, C.P.C., that duty is cast on the appellate court to find that the decree of the trial court should be set aside. Even the fact that there are some defects or infirmities in the reasoning of the trial court is not a ground for the appellate court to remand the same to the trial court. The appellate court should come to the clear conclusion that the findings of the trial court cannot be supported and must be set aside. Only in exceptional cases where the judgment of the trial court is wholly unintelligible or incomprehensible that the appellate court can remand the suit for fresh trial. ... "

(iv) In Palanisamy @Uthayarpalayanthan vs. Apparsamy reported in 2002 (3) MLJ 704, this Court held that when the material was available before the appellate court, it should have itself decided the appeal one way or the other and an unwarranted order of remand gives the litigation an undeserved lease of life and therefore, must be avoided.

(v) A Division Bench of this Court in Bhuvaneswari vs. Saraswathi Ammal reported in AIR 2005 Madras 399 has held that an order of remand cannot be for the mere purpose of remanding a proceeding to the Lower Court. Moreso, when enough oral and documentary evidence had been let in on the side of the plaintiff as well as on the side of the defendant.

(vi) In P.Purushotham Reddy and another vs. M/s.Pratap Steels Ltd., reported in AIR 2002 SC 771, the Supreme Court held that an unwarranted order of remand gives the litigation an undeserved lease of life and therefore must be avoided.

9. The catena of judgments reiterate the following principles of law that the order of remand cannot be passed by the Appellate Court as a matter of course. Remand is permissible only when the Appellate Court in the interest of justice feels that the remand is just and appropriate and that the Appellate Court should arrive at a specific finding on the materials available on record that the judgment of the Trial Court is erroneous and liable to be set aside, which is a conditional precedent. The Appellate Court should not remand the case on the ground that the evidence is not properly assessed. Order of remand should not be made when the defect in the proceeding has been due to negligence or default of the party, who will benefit by the remand. The order of remand should not be made to fill up a lacuna by allowing the party to adduce evidence. If it is possible for the Appellate Court to evaluate the oral and documentary evidence, then it is not open to the Appellate Court to come to the aid of the parties to fill up the lacuna in the evidence. If material particulars

are available, the Appellate Court itself should decide the matter one way or the other. Remanding the matter for fresh adjudication gives the litigation a fresh lease of life in the protraction of proceedings.

10. In the instant case, oral and documentary evidence has been let in by the parties. The Appellate Court itself can evaluate the evidence and dispose of the case on merits. Allowing the plaintiff to let in fresh evidence to prove his means would amount to, permitting him to fill up the lacuna in the evidence. The further reasoning of the Appellate Court that a specific finding is required with regard to Ex.P1-Promissory Note is also uncalled for and that the Appellate court itself should go into the facts and give a finding.

Order 41 Rule 23 to 29 C.P.C. mandates a duty on the Appellate Court to find that the judgment of the Trial Court is erroneous. The Lower Appellate Court has not specifically found that the judgment and decree of the Lower Court is erroneous for no valid reasons. In such circumstances, the Lower Appellate Court has not followed the above said legal principles while deciding the appeal and has unnecessarily remanded the suit for fresh disposal to let in additional evidence, which is not called for.

11. Since the suit is only for recovery of money under the promissory note, which is pending since 2002, the Appellate Court is directed to dispose of the appeal on the basis of the available materials and pass orders within a period of three months from the date of receipt of a copy of this order. The Civil Miscellaneous Appeal is ordered accordingly. No costs. Consequently, connected C.M.P.No.16753 of 2004 is closed.

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To

1. The Principal District Judge,
Cuddalore.

2. The Section Officer,
` V.R.Section,
High Court of Madras,
Chennai.

[PRV/10117]